No. 4496.

~~1440~~ IN THE 1434

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALEXANDER B. STEWART, FRANK KUBOTA, JACK MILLER and OSCAR LUND,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR, JACK MILLER.

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INTRODUCTION.

The defendant and plaintiff in error, Jack Miller, was indicted on January 14, 1924, with some twelve other defendants, for a claimed violation of section 37 the Criminal Code of the United States, the indictment attempting to set forth a conspiracy to violate section 3 of title 2 of the Prohibition Act and section 593 of the Tariff Act of 1922. The conspiracy is alleged to have existed from January 1, 1923, down to the filing of the indictment.

The overt acts pleaded are substantially as follows: (1) That the defendant, Nagai, brought liquor from the steamer "Borealis" to the plant of the Curtis

Corporation, located at Long Beach, California. (2) That several of the defendants, including plaintiff in error Miller, met at this plant and assisted in unloading the boat used by Nagai in bringing in the liquor. (3) That at this plant the defendants Lewis, Dudrey and Knowlton loaded liquor on to automobile trucks, and the defendant Stewart drove away in an automobile containing liquor. (4) That the defendant Cheney rented some land in Topanga Canyon, California, to defendant Claude Dudrey, after which the defendants Claude Dudrey, Knowlton and Lund erected thereon a structure in which they caused liquor to be placed, which liquor was transported therefrom by the defendants Knowlton and Lund. The complete text of the indictment appears in the Transcript of Record (pp. 12-32).

The cause proceeded to trial on January 21, 1925. During the progress of the trial a motion was made on behalf of all the defendants to strike the word "feloniously" from the 2d and 3d counts of the indictment, and the words "section 813" from the 3d count. The Court ordered the word "feloniously" stricken from the indictment, but denied the motion as to the words "section 813." At the conclusion of the Government's case the defendants moved for a directed verdict, and to have the testimony given by the witness Dolly stricken from the record. On the 31st of January, 1925, the jury returned their verdict, and defendant and plaintiff in error Miller was found guilty on all four counts, being sentenced to two years' imprisonment and ordered to pay a fine of $15,000 (Trans. of Record, p. 121). A motion for a new

trial was made on behalf of defendant and plaintiff in error Miller, denied by the Court and an exception taken to the adverse ruling. On February 14, 1925, a petition for a writ of error was filed by the defendant and plaintiff in error Miller. The petition was allowed, a *supersedeas* bond being fixed in the amount of $50,000, which was subsequently reduced by the Court. (Trans. of Record, p. 267.)

STATEMENT OF FACTS.

Briefly, the transcript of record brings out the following facts: At 12:50 a. m. March 22, 1923, C. E. Clay, a watchman for the San Pedro Lumber Co., located at Long Beach, California, saw two trucks and a touring car driven by the defendant Lund, in front of the plant of the Curtis Corporation. He was suspicious and notified the police. The immediate result was the arrest of the defendants Dudrey, Lund and Knowlton by Officer Imbros, and the finding of some liquor in an automobile driven by the defendant Stewart.

Officer Murphy said he did not see the plaintiff in error Miller at the Curtis plant, and neither did newspaper reporter Arthur Pangburn, who was present when the arrests were made. The defendant Nagai was arrested on the same night, being the owner of a boat which was being used to land liquor.

The plaintiff in error Miller was arrested on the same night, *i. e.*, March 22, 1923, under circumstances explained by him in his testimony. (Trans. of Rec., pp. 195, 198.) He was not put in jail, but allowed to stay in a hotel.

The other defendants, with the exception of Talbot, were apprehended on the same night in the vicinity of the Curtis plant. Talbot was apprehended on April 16th in the automobile of one H. L. Brown, which was found to be transporting some liquor.

Around this statement of facts revolves the evidence on the basis of which plaintiff in error Miller was convicted on all four counts of the indictment. It is now purposed to consider somewhat in detail those phases of the testimony in the bill of exceptions affecting the plaintiff in error's case.

SPECIFICATIONS OF ERROR RELIED UPON.

1. Testimony of a co-conspirator should be regarded with suspicion.

Two of the alleged conspirators, Cheney and Nagai, testified for the government in this case. So far as the transcript shows, they furnished the only testimony concerning alleged operations at the Cheney ranch in Topanga Canyon. Cheney said he only *thought* the building alleged to have been erected by the conspirators contained liquor. (Trans. of Rec., p. 135.) Thus, he was only voicing an opinion, and admitting this testimony was a violation of the well-recognized opinion rule.

Furthermore, Cheney said he had seen Miller on his premises, but Miller denied this, and there was no corroboration by any Government witness. It is true that the jury were instructed that corroboration is necessary to the testimony of a co-conspirator. But it is submitted that the government did not comply with

this requirement of corroboration. In fact, it appears that none of the witness Cheney's statements were corroborated, and that therefore the government failed to establish its case with respect to operations of the alleged conspirators on the Cheney ranch. Both conspiracy counts of the indictment are concerned largely with these alleged operations, and the defendant and plaintiff in error Miller was prejudiced to the extent that Cheney's uncorroborated testimony was relied upon.

The same reasoning applies to the testimony of the defendant Nagai. In the first place, he only *thought* that the plaintiff in error Miller was on his boat. (Trans. of Rec., p. 137.) This fact was denied by Miller, and not corroborated by any other government witness. Such testimony is certainly not entitled to much weight, even if admissible, and as a matter of fact it appears inadmissible under the opinion rule. Here again, then, the plaintiff in error Miller is linked up with a phase of the conspiracy charged by the uncorroborated testimony of an accomplice. While the jury may convict on the uncorroborated testimony of an accomplice, it ought not do so. (16 Corpus Juris, par. 1424.) No man can receive a fair trial if he is forced to stand in a background of fraud and knavery created by the acts of others, but which necessarily throw their dubious gloom over his own conduct and impart a sinister significance to his own acts.

It should also be recalled that the credibility of the testimony of an accomplice is considerably affected where the accomplice testified with the hope of se-

curing immunity. (16 Corpus Juris, par. 1421.) It is clear that such a thought was in the mind of the witness Nagai, he having said:

> "I thought that if I confessed the punishment would be somewhat lighter. * * *" (Trans. of Rec., p. 139.)

II. Opinion evidence is inadmissible.

It is elementary that generally speaking a witness can only state facts within his personal knowledge, and is not entitled to voice his opinion. (22 Corpus Juris 485.) There are certain well-recognized exceptions to the rule prohibiting a witness to give his opinion, such as the admissibility of (1) so-called "mediate inferences" (*Holland* v. *Zollner,* 102 Cal. 633), (2) opinions on value, (3) opinions on the issue of sanity, and (4) opinions of experts. In the case at bar, an opinion of the witness Nagai was admitted, and it is submitted that such opinion was clearly inadmissible, not coming within any of the exceptions to the opinion rule. On page 137, Transcript of Record, the witness Nagai, in telling about the bringing in of liquor from a ship at sea, said:

> "We loaded, boxes, and I *presume* it was liquor."

Counsel for the defense objected to the admission of this testimony, and duly excepted when his objection was overruled. (Trans. of Rec., p. 138.) It should be recalled that Nagai was an accomplice, and was testifying against his alleged co-conspirators in the hope of escaping punishment. The court gave no reason for admitting this opinion testimony, and it was

clearly prejudicial to all the defendants, including the plaintiff in error Miller.

III. A witness may refer to notes to refresh his memory, *but he is not allowed to read them as his testimony.*

Police Officer Murphy, in testifying for the Government, used a typewritten copy of notes he had taken on the night liquor was found in defendant Stewart's automobile, and no objection was made to this. Officer Imbros then testified from a copy of the notes which Murphy had taken. Exceptions were duly taken to this testimony, on the ground that he was not using the notes to revive a present recollection, but was testifying from the notes themselves. On page 153, Transcript of Record, the Court asked:

> "I understand, Mr. Imbros, that you have no present independent memory of this conversation?"

Imbros replied:

> "Well, it has been so long since this happened, and I have had so many cases in the meantime, that I can't think of them all without having notations of them."

Thus it appears that Imbros did not have any definite recollection of what happened, and that the notes did not refresh his memory to the extent of enabling him to testify without reading therefrom. Therefore, the objection to Imbros' testimony should have been sustained.

Wigmore, learned author on the law of evidence, has said:

> "Since the Narration or Communication should represent actual recollection * * *, it becomes necessary to forbid the use of various artificial written aids capable of misuse so as to put into the witness' mouth a story which is in effect fictitious and corresponds to no actual Recollection. Under pretext of stimulating the witnesses recollection, if an actual present recollection results, of the quality sufficient for testimony * * *, the process and the result are legitimate. But the expedients used for stimulating recollection may be so misused that the witness puts before the Court what purports to be but is not in fact his recollection and knowledge."
>
> (Wigmore on Evidence, 2nd ed., Vol. II, Par. 758; see, also, Zoline's Fed. Cr. Law & Proc., vol. I, par. 380.)

It was undoubtedly prejudicial to plaintiff in error Miller for this testimony of Officer Imbros to get to the jury. Not only was there a violation of the rule against reading from a memorandum concerning the contents of which the witness has no present recollection, but it also appears that both Officer Murphy and the defendants testified against, said things not reported in the notes. It is not at all impossible that that which was not reported was more favorable to defendants than that which was written down.

IV. Evidence of other crimes is not competent to prove the specific crime charged.

While testifying concerning the plaintiff in error, Miller, Prohibition Agent Dolley was asked by the prosecution:

"Well, now, he had never been in jail, had he, up to this time?"

Dolley answered:

"I understand he served five years in Vancouver."

Counsel for Miller promptly asked that this testimony be stricken out. As a matter of fact, it would appear that upon proper objection, the Court should not have even allowed the question to be answered. In the first place, Dolley's answer was only his opinion, and thus inadmissible under the well-established opinion rule, considered elsewhere in this brief.

Secondly, the general rule is that on a prosecution for a particular crime, evidence which in any manner shows, or tends to show, that the accused has committed another crime wholly independent of that for which he is on trial, even though it is a crime of the same sort, is irrelevant and inadmissible (16 Corpus Juris, 586. See, also, 22 Corpus Juris, par. 835). In the language of the Court in *Weil* v. *United States*, (1924) 2 Fed. (2d) 145, at p. 146:

"An independent crime cannot usually be offered in evidence in order to prove the offense charged."

In *Guilbeau* v. *United States,* (1923) 288 Fed. 731, the defendant was charged with a violation of the Harrison Narcotic Law, the sale of morphine being charged. Evidence of other sales was admitted. With respect to this, the Court said:

"In our opinion this evidence should not have

been admitted * * * The general rule is that evidence that accused has committed another crime wholly independent of that for which he is on trial is wholly irrelevant and not admissible." (288 Fed. 733.)

V. Evidence of other crimes is unduly prejudicial to defendant.

The rule which in general prohibits evidence of particular acts is based upon the principle that the admissibility of such acts would introduce collateral issues, confuse the jury, and lead to undue prejudice against the defendant.

The principle that the erroneous admission of evidence against an accused in a Federal Court will be presumed to have been prejudicial, unless it is made to appear beyond a doubt that it was harmless, is supported by the following cases:

Sprinkle v. *U. S.*, 150 Fed. 56;
Angle v. *U. S.*, 205 Fed. 542;
Miller v. *Territory of Oklahoma*, 149 Fed. 330;
Williams v. *U. S.*, 158 Fed. 30.

It has been said that:

"Proof of them (other acts) only tend to prejudice the defendants with the jury, to draw their minds away from the real issue and to produce the impression that they (the defendants) were wretches whose lives were of no value to the community and who were not entitled to the benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death—— However depraved in character and however full of crime their past lives may have been, the defendants

were entitled to be tried upon competent evidence and only for the offense charged."

In *Hall* v. *U. S.*, 256 Fed. 748, the Court said:

> "* * * any evidence tending to show that the defendant had made threats against the President, unconnected with the offenses of which he was convicted, became wholly immaterial to the issues then being tried, and could only create the impression that, in addition to the other offenses charged, defendant was disloyal to the Government and he had so far forgotten the rules of propriety as to attack the President. The introduction of this evidence would, of necessity, tend to create a false impression upon the minds of the jury, who would unconsciously reach the conclusion that one guilty of making such an unjustified attack upon the President must naturally be guilty of offenses wherein he was charged with being unmindful of the duty that he owed his country." (256 Fed. 749-50.)

VI. An admission of guilt made by the defendant outside of court is inadmissible, if it was made under circumstances involving such a hope of benefit as was likely to induce a false confession.

Of all the Government testimony reported in the Transcript of Record, that of Prohibition Agent Dolley was the most damaging to the plaintiff in error Miller, and the most likely to influence the jury. That the statements made by Miller to Dolley were in the nature of an involuntary (and thus inadmissible) confession is evident from Dolley's own statements. Among other things, he testified as follows:

> "During the time we were in San Francisco, Mr. Miller was not on bail, but technically in custody. He was allowed more or less freedom

while in San Francisco. It seems he did take trips around San Francisco by himself. *My reason for allowing this was he was furnishing information to me.*" (Trans. of Rec., p. 169.)

"The reason Mr. Miller was not put in jail the same as the other defendants was because he was talking about the events and furnishing me information." (Trans. of Rec., p. 171.)

Also, in answer to a direct question as to why Miller was allowed his freedom, Dolley replied that it was in exchange for his promise to furnish information. (Trans. of Rec., pp. 169-170.) It appears further that Miller offered to take Dolley to Vancouver and disclose the operations of the Independent Exporters, Ltd., a Canadian liquor concern. Steps were taken toward making this trip, the possibility of it being allowed was relied on by Miller, and he thus spoke more freely than he otherwise would have. Dolley did not tell Miller that anything he said would be used against him, and so admitted in his testimony. (Trans. of Rec., p. 168.)

It is elementary that to make a confession involuntary, and hence inadmissible, there must have been sufficient inducement by one in authority to elicit an untrue statement. It is submitted, however, that these tests are met by the case at bar, making Dolley's testimony inadmissible.

(1) Inducement. The plaintiff in error Miller had reason to hope for leniency, or perhaps freedom, when Dolley allowed him to remain unguarded in a hotel and took active steps to secure permission to make a trip to Vancouver for the purpose of producing the

records of a Canadian liquor-exporting firm. (2) Person in authority. A person in authority is one who has the right, owing to the relation which exists between him and the accused, to make assurances of favor to the person confessing. Any person officially connected with the prosecution is a person in authority. Furthermore, it is sufficient to render a confession involuntary if the inducement is reasonably presumed by the accused to have been made by one in authority. Thus, it is clear that plaintiff in error Miller's statements to Dolley were inadmissible under the confession rule.

VII. The court permitted improper re-direct examination.

On a re-direct examination, the examiner may seek by his questions to obtain such testimony as tends to deny, modify or explain the facts answered in the next preceding stage of examination, and no others. Thus, it would seem that it was improper re-direct examination of Government witness Nunn to ask him about a conversation with the defendant Knowlton, when it was admitted that the alleged conversation was not mentioned at any previous stage of the proceedings. (Trans. of Rec., p. 183.)

VIII. The record of judicial proceedings is incompetent and inadmissible, *where such proceedings are irrelevant to the issue.*

Counsel for the Government offered a certified transcript of the proceedings in a case brought by the State of California against one of the defendants,

Knowlton (alias King). This was immediately objected to by counsel for the defense, and an exception duly taken. It is submitted that the evidence objected to should not have been admitted, since it was wholly irrelevant, and undoubtedly a factor capable of influencing the jury against the defendants here, including plaintiff in error Miller. As was said in *Grantello* v. *United States,* 3 Fed. (2d) 117, to receive evidence of like offenses to those charged in the indictment under which the defendants are on trial is neither competent, fair nor just.

IX. Alleged overt acts antedating the proof of the formation of the unlawful combination are inadmissible.

Counsel for the Government asked the defendant Talbot the following question:

> "Did you December 26, *1922,* send a telegram headed 'Vancouver, B. C.,' addressed to Mrs. Hazel Talbot, 6576 Fountain Ave., Los Angeles, California?" (Trans. of Rec., p. 210.)

It is submitted that neither the telegram in question, if such had been produced, nor testimony regarding it, is admissible. It is true that it is not necessary to set forth in a conspiracy indictment all the overt acts relied upon, and further, that the prosecution is not limited to the overt acts charged. But it is also true that there must be some connection between the overt acts attempted to be proved and the conspiracy alleged. The indictment alleges that the conspiracy began in January, 1923, whereas the alleged act of sending the telegram was supposed to have been per-

formed a year previously. This telegram, with questions concerning it, was intended to establish dealings in Vancouver between the plaintiff in error Miller and defendant Talbot. Since the alleged telegram antedated the beginning of the conspiracy as alleged in the indictment, it was improper proof, and nothing concerning it should have been admitted.

In *United States* v. *Richards,* 149 Fed. 443, 452, the Court said:

> " * * * it must be established that the conspiracy which is charged to have existed and which is the gist of the action in this case had been formed before and was existing at the time of the commission of the overt act."

Also, in *United States* v. *Cole,* 153 Fed. 801, 804, it is said that the overt act required to constitute a conspiracy "* * * must be a *subsequent,* independent act, following a completed conspiracy, and done to carry into effect the object of the original combination."

X. Admission of testimony concerning contents of purported telegram violated the best evidence rule.

It has already been shown that anything done by either of the defendants prior to January 1, 1923, is irrelevant. But testimony concerning the telegram supposed to have been sent by defendant Talbot in December, 1922, was inadmissible for the further reason that the best evidence rule was violated. Nowhere in the transcript on appeal does it appear that the telegram in question was produced in court. And neither was any attempt made to lay a foundation for

the admission of secondary evidence to prove its contents. The rule has been stated as follows:

> "The best evidence of the contents of a telegram is the original message itself, and parol evidence of the contents of the message is admissible only where the original writing is lost or its absence is otherwise satisfactorily explained." (22 Corpus Juris, 989.)

In conclusion, it is submitted that the specifications of error herein contained are ground for ordering a new trial for the plaintiff in error Miller.

Respectfully,

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